

January 13, 2009

Chairman Gary Perry  
Senate Judiciary Committee

RE: SB 157

Dear Mr. Chairman and Members of the Committee,

Disability Rights Montana believes that SB 157 as an unconstitutional infringement upon the right of a respondent in a civil commitment proceeding to receive a fair hearing.

Under current law, a respondent in a civil commitment proceeding has the right to a trial or a fact-finding hearing in front of a judge. The respondent may elect to appear at any civil commitment hearing by video. If any party to the civil commitment proceeding requests that respondent appear by video, the respondent has a right to object. If the respondent objects, the respondent must be allowed to be in the courtroom for the hearing. MCA 53-21-140(5).

In current practice, video hearings are reportedly common for the initial hearing, when counsel is appointed, the respondent is informed of his or her rights, and the evidentiary hearing is scheduled. In most cases, the respondent is detained in a treatment facility at the time of the initial hearing. That facility maybe a local hospital bed, or it may be a distant hospital bed, including the Montana State Hospital. The initial hearing is typically brief, and the video hearing eliminates the need for law enforcement transportation from the treatment facility to court. The costs of transportation to and from civil commitment hearings are paid by the county.

In a substantial number of cases, the respondent is discharged from the treatment facility after the initial appearance but before the evidentiary hearing, and the petition is dismissed.

In many other cases, the respondent waives the hearing, essentially acquiescing to the commitment. (The judge signs the commitment order in these cases, so these are not voluntary hospitalizations.)

In the remaining cases, there is an evidentiary hearing, which is almost always combined with the dispositional hearing.

There is a constitutional right to due process in civil commitment proceedings under both the

Montana and the United States constitutions. The Montana Code provides that the respondent in civil commitment proceedings has a right to be present in court, and that participating in the hearing by video is the same as being present in court. MCA 43-21-140 (1).

But saying that participating in a proceeding by video is the same as attending in person doesn't make it so.

It is a safe bet that a privately retained attorney would not allow her client to participate in a hearing of any importance by video link. The isolation of the client from the solemn spectacle of the courtroom, being unable to pass notes or otherwise communicate confidentiality during the hearing, the diminished opportunity for the fact-finder to assess the client's demeanor and the client's diminished ability to evaluate the effect of the evidence or arguments on the fact-finder—among other losses—make participating by video a vastly inferior option for plaintiff or defendant.

In the evidentiary phase of a civil commitment proceeding, a respondent seated in a hospital conference room many miles from the court room is himself eloquent testimony to impairment, dangerousness and the need for involuntary care in a secure setting. Ironically, among the statutory protections the respondent has is the right to wear his own clothes during the civil commitment hearing, because appearing in a hospital gown would be prejudicial. MCA 53-21-115(10).

The Montana Supreme Court has found that civil commitment impinges on the right to liberty, dignity and privacy guaranteed by the Montana constitution. The court has commented at length on the importance of every procedural safeguard afforded by the Montana code in civil commitment proceedings. The court noted approvingly that the civil commitment statutes convey "the notion that the hearing shall be conducted in court, not in a mental health facility, which enhances the dignity afforded to the individual." *In re K.G.F.*, 1999 MT 493, ¶ 46.

It is conceivable that a respondent in a civil commitment proceeding will not be prejudiced by participating in the proceeding by video. It is conceivable that a respondent will be willing to accept some loss of procedural fairness in exchange for not having to travel to the courtroom. It is conceivable that counsel for the respondent, in consultation with the respondent, will conclude that participating by video is to the respondent's advantage in a particular case.

But the 2001 Montana Legislature recognized that the decision to forego personally appearing in court must be left to the respondent. By eliminating that critical safeguard, the amendment proposed by SB 157 would make to MCA 43-21-140(5) unconstitutional.

Sincerely,



Anita Roessmann  
Staff Attorney